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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

JOAQUIN MARIO SERNA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Speedy Trial Clause of the Sixth Amendment apply to a delay prior to arrest when the defendant is unaware that charges have been filed and is not available for prosecution?

2. Was the holding in *United States v. Marion* intended to suggest that the filing of a complaint and issuance of an arrest warrant invokes the protection of the Speedy Trial Clause in a misdemeanor case?

3. Can a state statute of limitations period be used to define the length of delay which satisfies the threshold requirement of presumptively prejudicial delay described in *Barker v. Wingo*?

4. In conducting the balancing test set forth in *Barker v. Wingo*, must actual prejudice to the defendant be presumed from a one-year delay?

ADDITIONAL PARTIES

In addition to the parties listed in the caption, the Superior Court of Los Angeles County was designated as a party in the court below and the Municipal Court of the Los Angeles Judicial District was named as a party in respondent's original petition for a writ of mandate. These courts, however, have not made an appearance either in writing or at oral argument at any stage of the proceedings below and appear not to have a sufficient interest to warrant being named as parties in the instant proceedings.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Supreme Court is published as *Serna v. Superior Court,* 40 Cal.3d 239 (1985), and appears in the appendix hereto at page A-1. The order of the California Court of Appeal, Second Appellate District, Division Four, was not published but appears in the appendix at page A-58. No opinion was issued by the Superior Court of California, County of Los Angeles, but a copy of the court's minutes is included in the appendix at page A-59. No opinion was rendered by the Municipal Court of the Los Angeles Judicial District.

JURISDICTION

The judgment of the California Supreme Court was entered on October 24, 1985. A timely petition for rehearing was denied on December 19, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

STATEMENT OF THE CASE

On September 8, 1978, respondent Joaquin Serna was working the night shift as a gas station attendant. After his shift ended, it was discovered that $955 in cash which had been received for sales during his shift had not been deposited in the safe and was missing. Serna never returned to work. He had borrowed his mother's car the night before the theft and was believed to be heading for Florida. (*Serna v. Superior Court*, 40 Cal.3d 239, 247-248 (1985); Appendix [hereinafter App.], *infra*, A-4 to A-6.)

On September 29, 1978, a misdemeanor complaint was filed charging Serna with embezzlement in violation of California Penal Code section 508.[1] A warrant was issued for his arrest.

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[1]Under California law, embezzlement is one of many serious crimes which may be prosecuted as either a felony or a misdemeanor at the discretion of the prosecutor. (California Penal Code section 17(b)(4).) This class of offenses, termed "wobblers," includes assault with a deadly weapon, second degree burglary, grand theft, and forgery. (California Penal Code sections 245, 459, 487, 470.)

Serna was not arrested until February 15, 1983, over four years later. On April 25, 1983, he filed a written motion to dismiss for lack of speedy prosecution which expressly relied on the Sixth Amendment to the United States Constitution as well as article I, § 15 of the California Constitution. The motion included a declaration of Joaquin Serna stating that respondent had no knowledge of the charges prior to his arrest. The Municipal Court denied respondent's motion to dismiss on May 16, 1983. The trial court judge specifically rejected both the federal and state claims.

On June 15, 1983, Serna filed a petition for writ of mandate in the Superior Court, again relying on the protections of both the United States and California Constitutions. The petition was denied on September 22, 1983. (Minutes of the Superior Court of California, App., *infra*, A-59.)

On September 28, 1983, Serna filed a petition for writ of mandate in the California Court of Appeal, Second Appellate District, again raising the same arguments. This petition was summarily denied on December 20, 1983. (Order of the California Court of Appeal, App., *infra*, A-58.)

A petition for hearing was then filed in the California Supreme Court on December 30, 1983. On January 26, 1984, the California Supreme Court granted a hearing and ordered that an alternative writ of mandamus issue. The People filed an answer, Serna filed a traverse, and the cause was argued on October 12, 1984.

The California Supreme Court issued its opinion on October 24, 1985. Finding no basis for relief under the California Constitution, the court turned to a determination of "the time at which an accused misdemeanant's right to a speedy trial under the Sixth Amendment to the

United States Constitution attaches." (*Serna v. Superior Court, supra* at 245; App., *infra*, A-2.) Basing its decision solely on federal grounds, the court held that "opinions of the United States Supreme Court state, without qualification as to the level of offense charged, that the right attaches with the filing of the accusatory pleading or arrest, whichever is first." (*Id.*) Accordingly, the court held that "when an offense is charged as a misdemeanor it is the filing of the complaint (or earlier arrest) which triggers the defendant's Sixth Amendment right to a speedy trial." (*Id.*)[2] The opinion went on to hold that "a delay between the filing of a misdemeanor complaint and the arrest and prosecution of a defendant which exceeds the statutory period of limitation is unreasonable and presumptively prejudicial . . . ." (*Id.* at 253; App., *infra*, A-15.) The court thus held that a delay which is longer than one year not only satisfies the threshold requirement which triggers a full Sixth Amendment review pursuant to *Barker v. Wingo*, 401 U.S. 514, 530 (1972), but also requires that it be presumed that the defendant suffered actual prejudice.

In a dissenting opinion joined by Justice Kaus, Justice Lucas noted that

> The United States Supreme Court has never extended speedy trial rights to prearrest delays and our own court has held that the filing of a criminal complaint does not trigger the federal speedy trial guarantee. (*Id.* at 270; App., *infra*, A-44.)

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[2]The opinion also addresses a procedural issue concerning the standard of review for the denial of a petition for writ of mandate and ruled that respondent's speedy trial claim under the California Constitution had been properly denied because Serna had failed to demonstrate that he had suffered actual prejudice. Therefore, the decision of the court below was clearly not based on the California Constitution but solely on federal grounds.

The conclusion of the dissent that the Sixth Amendment was not applicable was based in part on this Court's decision in *United States v. MacDonald,* 456 U.S. 1 (1982):

> *MacDonald* establishes that not all criminal accusations automatically trigger the protections of the speedy trial provision. The only ones so affected are those that present a realistic possibility of (1) pretrial incarceration, (2) anxiety to the accused, or (3) public scorn arising from widespread knowledge of the charges. (*Id.* at 271, App., *infra,* A-45.)

Both petitioner and respondent filed timely petitions for rehearing. The prosecution pointed out that the opinion had failed to recognize that while the statute of limitations for most misdemeanor offenses was one year, the limitations period was three years for the most serious misdemeanor offenses, such as that in the instant case, which could be prosecuted as either felonies or misdemeanors.

On December 19, 1985, the California Supreme Court denied rehearing but modified the opinion to state that prejudice would be presumed where the delay between the filing of a misdemeanor complaint and the arrest of the defendant exceeded the one-year limitations period applicable to most misdemeanor offenses regardless of the statute of limitations for the offense actually charged. The court thus modified the above-quoted portion of their opinion to read "that a delay between the filing of a misdemeanor complaint and the arrest and prosecution of a defendant which exceeds one year is unreasonable and presumptively prejudicial. . . ." (Order of the California Supreme Court; App., *infra,* A-61; Modification of Opinion published at 40 Cal.3d 702a (1985); App., *infra,* A-54.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW MISCONSTRUES THIS COURT'S OPINION IN *UNITED STATES V. MARION* AND WRONGLY CONCLUDES THAT THE FILING OF A MISDEMEANOR COMPLAINT AND ISSUANCE OF AN ARREST WARRANT TRIGGERS THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE THE DEFENDANT HAS NOT BEEN ARRESTED, DOES NOT KNOW CHARGES ARE PENDING, AND IS NOT AVAILABLE FOR PROSECUTION.

The instant case presents the important question, never directly addressed by this Court, of whether the Speedy Trial Clause of the Sixth Amendment applies to a delay before the defendant has been arrested or is otherwise available for prosecution. A related issue of first impression is whether the right to a speedy trial attaches upon the filing of a misdemeanor complaint and issuance of an arrest warrant. The rationale of this Court's Sixth Amendment decisions compels the conclusion that the Speedy Trial Clause does not apply to a delay in effectuating an arrest. Nevertheless, the California Supreme Court has ruled that a delay between the filing of a misdemeanor complaint and the arrest of the defendant can violate the right to a speedy trial under the Sixth Amendment.

In reaching their erroneous result, the court below relied on some ambiguous language used in this Court's opinion in *United States v. Marion,* 404 U.S. 307 (1971). It is therefore important that this Court clarify the meaning of this frequently quoted language.

In every case previously considered by this Court in which the Sixth Amendment right to a speedy trial was found to apply, the defendant had either been arrested or

knew that charges were pending. In each case the prosecution had begun and the defendant was actively engaged in his defense. For example, in *United States v. Marion, supra,* the seminal decision discussing when the right to a speedy trial attaches, an indictment had been issued and the defendant was available for prosecution. The defendant in *Marion* argued that a delay in returning the indictment violated his right to a speedy trial. In ruling that the Sixth Amendment right to a speedy trial was not applicable prior to the issuance of an indictment, this Court first studied the language and history of the Speedy Trial Clause and concluded that the protection of the Amendment is activated only when a criminal prosecution has begun . . ." and observed that related speedy trial protections did not apply to delay prior to the arrest of the defendant. (*Id.* at 313, 314 n. 6, 319.) Next, the opinion turns to a careful examination of the purposes of the Sixth Amendment's speedy trial provision. In describing the "major evils protected against by the speedy trial guarantee," this Court was concerned with whether a delayed trial would actually disrupt the defendant's life and focused on the importance of the fact that an arrest had occurred:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. (*Id.* at 320.)

However, the opinion concludes in rather general language that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*Id.*) While this language suggests

that the Speedy Trial Clause could apply to a delay before the defendant has been located and arrested, the paragraph immediately following again stresses that the point of arrest is crucial:

> But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusations: his situation does not compare with that of a defendant who has been arrested and held to answer.

Ignoring this emphasis on the fact of arrest and its implications for the defendant and relying solely on the somewhat ambiguous language used to state the holding in *Marion,* the California Supreme Court held that the filing of a complaint and the issuance of an arrest warrant in a misdemeanor case triggers the Sixth Amendment right to a speedy trial even though the defendant has not been arrested, is unaware that charges are pending, and is not available for prosecution.[3] In the instant case, Serna disappeared immediately after the crime occurred. A misdemeanor complaint was filed and an arrest warrant issued but it was not until defendant was arrested that he first learned that charges were pending and became available for prosecution.[4] Under such circumstances the interests the Sixth Amendment was intended to protect are

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[3]To quote the opinion below:

> [O]pinions of the United States Supreme Court state, without qualification as to the level of offense charged, that the right [to a speedy trial] attaches with the filing of the accusatory pleading or arrest, whichever is first. (*Serna v. Superior Court,* 40 Cal.3d 239, 245 (1985); App., *infra,* A-2.)

[4]The decision below acknowledges that Serna presented "a declaration in which he stated that he had no knowledge of the charge prior to the date of his arrest . . . ." (*Id.* at 247; App., *infra,* A-5.)

not implicated. There is no need "to prevent undue and oppressive incarceration . . . ." Nor is it possible "to minimize anxiety and concern accompanying public accusation . . ." when the defendant is unaware that charges have been filed.[5] Further, since no arrest has yet occurred, there is no interference with the defendant's liberty. His employment is not disrupted, his finances are not drained, and he could not be subjected to public obloquy or anxiety.

This Court's most recent decision in this area reemphasized that in determining whether the right to a speedy trial is applicable, the primary focus must be on whether the defendant has suffered a restriction on his liberty. In *United States v. Loud Hawk, et al.*, ____ U.S. ____ (January 21, 1986), it was determined that the time during which the prosecution appealed the dismissal of an indictment would not be counted in determining whether a speedy trial was denied. Paramount in this Court's reasoning was the fact that during this period the defendant's liberty was unimpaired. The opinion states:

> [T]he Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect or a defendant from every expense or inconvenience associated with criminal defense.
>
> We therefore find that under the rule of *MacDonald*, when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause.

In the instant case, Serna was neither incarcerated nor subjected to any restriction on his liberty during the

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[5]If the defendant were aware of the charges but was avoiding arrest, he could not be heard to complain of the resulting delay.

period prior to arrest. Being unaware of the charges, Serna suffered none of the ills which the Sixth Amendment was designed to redress.

The recognition in *Loud Hawk* that impairment of liberty is the core concern of speedy trial protections is not new. In *United States v. MacDonald,* 456 U.S. 1, 8 (1982), this Court recognized that

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. (See also *United States v. Gouveia,* ____ U.S. ____, 52 U.S.L.W. 4659, 4661 (May 29, 1984).)

None of these concerns applies in the instant case. Prior to his arrest, defendant's liberty was not impaired and his life was not disrupted. This is not to say that delay in effectuating an arrest might not impair the defendant's ability to prepare a defense and thus deny him a fair trial. But such concerns are more properly addressed within the ambit of the Due Process Clause of the Fifth Amendment. (*United States v. Marion, supra,* at 321, 324.)

Rather than carefully consider the reasoning of the decision in *Marion* to determine if the Speedy Trial Clause was applicable in this case, the court below narrowly focused on language in *Marion* stating that the Sixth Amendment right attaches when the defendant "in some way becomes an 'accused,' " or upon the filing of an "indictment, information, or other formal charge." (*Serna v. Superior Court, supra,* 40 Cal.3d at 256; App., *infra,* A-20.) The California Supreme Court reasoned in mechanical fashion that since a misdemeanor complaint is

a "formal charge" the right to a speedy trial must attach upon its filing.

The statement in *Marion* that the speedy trial clause applies to delays following either a formal indictment or information was not meant to create a mere formalism to be applied unthinkingly. The basis for the result in *Marion* is that a speedy trial can be provided only after a prosecution has actually commenced. Thus delays in pre-arrest investigation are not cognizable. In the same manner, the delay in locating and arresting the defendant in the instant case does not raise a speedy trial claim. The prosecution could not actually commence until defendant was arrested.[6]

Nevertheless, despite the unequivocal import of this Court's reasoning, the opinion below demonstrates the necessity for this Court to clarify some ambiguous language in the *Marion* opinion which misled the California court. Specifically, *Marion* states that "it is either a formal indictment or information or else the actual restraints imposed by arrest" which triggers speedy trial protections. (*United States v. Marion, supra,* at 320.)

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[6]It is not accidental that this issue has arisen in the context of a misdemeanor case. Under California law, a warrant may issue for a felony offense and the defendant can be located and arrested *before* an indictment is issued. (California Penal Code section 813.) In a misdemeanor, however, an arrest warrant cannot be issued until *after* a complaint is filed. (California Penal Code section 1427.) Under such circumstances, the mere filing of a misdemeanor complaint for the purpose of obtaining a warrant does not magically invoke the protections of the Sixth Amendment. Whether or not a complaint has been filed, until the defendant is arrested, none of the considerations identified in *Marion* and *MacDonald* come into play.

Delays in serving arrest warrants are also more likely in misdemeanor cases due to their sheer numbers. As of January 1, 1986, there were 409,000 unserved misdemeanor warrants in California compared to 34,000 unserved warrants in felony cases.

While this language seems to include a delay following an indictment but prior to an arrest, the next paragraph of the opinion expressly states to the contrary: "but we decline to extend the reach of the amendment to the period prior to arrest." (*Id.* at 321.)[7] Further confusion is added because the above-quoted holding in *Marion* is expressly limited to an "indictment or information" (*id.* at 320) yet the opinion also uses the phrase "other formal charge" (*id.*) and states that the right applies when the defendant "in some way becomes an 'accused' . . . ." (*Id.* at 313.) Was this general language intended to suggest that the filing of a complaint and issuance of an arrest warrant was sufficient to invoke the protection of the Sixth Amendment? Petitioner urges this Court to accept this case to resolve these important issues.

Both the Second Circuit and Tenth Circuit of the United States Court of Appeals have recognized that even the issuance of a formal indictment does not trigger the Speedy Trial Clause if the circumstances do not threaten the evils addressed by the Sixth Amendment. Both decisions held that the return of a sealed indictment did not invoke the protections of the Sixth Amendment. The court in *United States v. Watson*, 599 F.2d 1149 (2d Cir. 1979),

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[7]Petitioner is aware, of course, that this apparent anomaly results from the fact that in many criminal prosecutions no arrest will occur because the defendant will appear in court voluntarily. This is apparently what occurred in *Marion*. Under such circumstances the issuance of the indictment triggers Sixth Amendment protections since the defendant is aware of the charge and available for prosecution. The opinion in *Marion* thus could not have stated that only an arrest invoked speedy trial protections because that would leave no protection for defendants who appear in court voluntarily. Hopefully, this Court will use the instant case as a vehicle to examine the situation not presented in *Marion* where a misdemeanor complaint is filed but the defendant is not available for prosecution.

carefully examined the reasoning used by this Court in *Marion* and concluded that

> the speedy trial right under the Sixth Amendment attaches not when a sealed indictment is filed but when it is unsealed (or when the Government arrests the defendant or otherwise apprises him of the charges against him). (*Id.* at 1156.)

The same conclusion was reached in *United States v. Hay*, 527 F.2d 990, 994 (10th Cir. 1975), in which the ruling was stated in terms which are directly applicable to the instant case:

> We do not include the time from appellant's indictment to his arrest because appellant was not available for prosecution and because none of the interests protected by the sixth amendment guarantee were in danger during this time.[8]

The opinion below attempted to distinguish the holdings in *Watson* and *Hay* on the basis that a misdemeanor complaint, unlike a sealed indictment, is technically available to the public. (*Serna v. Superior Court, supra* at 261; App., *infra*, A-29.) The California Supreme Court was able to attach significance to this distinction, however, only by engaging in the pure speculation, unsupported by any evidence in the record, that a defendant's life could possibly be affected by the existence of a criminal complaint of which the defendant is unaware. The court below surmised that there was

> a danger that a pending misdemeanor complaint of which the defendant is unaware may cause disruption of his life by affecting his credit rating, job

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[8]At least one other circuit had earlier reached a contrary conclusion without any discussion or analysis of the issue. (*United States v. Washington*, 504 F.2d 346, 347, 348 (8th Cir. 1974).)

> applications, admission to schools and other activities in which background checks are routine. (*Id.* at 261; App., *infra*, A-29.)

The source of this knowledge that a pending complaint could be revealed by a routine background check was not disclosed. To petitioner's knowledge, such information is not routinely available to credit rating services or employers and could be discovered only through a rigorous search of the records of every municipal court in the state.[9] As has been recognized regarding records of criminal convictions which are also "public documents,"

> From a practical standpoint, however, the likelihood that the records could be located by anyone who did not already have some knowledge of the arrests and their location is extremely remote. Thus, those convicted persons enjoy a limited *de facto* protection against indiscriminate exploitation of the record. (*Craig v. Municipal Court*, 100 Cal.App.3d 69, 78-79 (1979).)

Additionally, it seems fanciful to suggest that a defendant could be denied a job or turned away from a school based on such information without learning that he was wanted by the police.

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[9]The chances of success in such a search would be minimal in that there are 85 municipal courts and 84 justice courts in California which together accepted over one and a half million new misdemeanor cases for filing during the 1983-84 fiscal year. (Judicial Council of California 1985 Annual Report p. 134.)

2. THE OPINION BELOW WRONGLY HOLDS THAT ACTUAL PREJUDICE MUST BE PRESUMED IF THE DELAY EXCEEDS THE STATUTE OF LIMITATIONS PERIOD AND IS THUS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *BARKER V. WINGO*.

The opinion below fails to follow the decision in *Barker v. Wingo*, 407 U.S. 514 (1972), in two important respects. First, the California Supreme Court used a statute of limitations period set by the state to define the length of delay sufficient to trigger a full Sixth Amendment analysis. (*Serna v. Superior Court, supra*, at 253, as modified at 702a; App., *infra*, A-15, A-55.) The opinion is thus in direct conflict with the clear holding in *Barker* that the threshold determination that the delay is "presumptively prejudicial" and thus warrants a full hearing must be made on a case by case basis. (*Barker v. Wingo, supra*, at 530-531.) Second, the court below confused the term "presumptively prejudicial" used to describe the length of delay sufficient to warrant a full hearing with the separate issue of whether actual prejudice resulted and mistakenly ruled that if the delay exceeds one year it must be presumed that the defendant suffered actual prejudice. (*Serna v. Superior Court, supra*, at 252, 254, as modified at 702b; App., *infra*, A-14, A-17, A-56.) The procedure established in *Barker v. Wingo*, which requires a court to base its decision on the particular facts of each case, is inconsistent with the use of such presumptions.

In *Barker v. Wingo, supra*, this Court rejected the adoption of a rigid or inflexible approach in determining the effect of a delay on the defendant's right to a speedy trial and instead held that the trial court must "engage in a difficult and sensitive balancing process" to determine whether the defendant's Sixth Amendment right has been violated. (*Id.* at 522, 529, 533.) The opinion identified

four factors which must be considered: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Id.* at 530.) The first factor, length of delay, was described as "a triggering mechanism." (*Id.; United States v. Loud Hawk, supra.*) This Court stated that "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." (*Barker v. Wingo, supra,* at 530.)

Two things were made emphatically clear in *Barker* concerning this "triggering mechanism." First, the length of delay sufficient to trigger the full balancing process could not be fixed but must vary from case to case. The opinion specifically stated

> because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. (*Id.* at 530-531.)[10]

Second, it was clear that although this Court used the phrase "presumptively prejudicial" in defining the length of delay sufficient to trigger an analysis of the three remaining factors, actual prejudice to the rights of the defendant was *not* to be presumed. This can be seen from the fact that prejudice is separately listed as one of the four factors to be considered. Nothing in the opinion suggests that actual prejudice should be presumed under any circumstances. Although a court must initially determine whether the length of delay is significant enough to justify an examination of the remaining three factors, all

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[10]This echoed an earlier statement in the opinion made in the course of rejecting the adoption of any rigid or inflexible approach; "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." (*Id.* at 523.)

factors including actual prejudice must be carefully weighed before a dismissal can be ordered for the denial of a speedy trial. In *Barker* itself, for example, this Court found that the delay of over five years "was extraordinary" and easily sufficient to trigger a full inquiry. Actual prejudice, however, was not presumed. Instead, upon reviewing the evidence introduced in the trial court this Court concluded that actual prejudice to Barker "was minimal." (*Id.* at 534; see also *United States v. Loud Hawk, supra.*)

Presuming that a defendant suffered actual prejudice would be inconsistent with the reality acknowledged by this Court that the lack of a speedy trial "may work to the accused's advantage. Delay is not an uncommon defense tactic." (*Barker v. Wingo, supra,* at 521.) Additionally, no purpose would be served by resorting to the fiction of such presumptions. There is no requirement that prejudice be shown before a court can conclude that the right to a speedy trial has been violated. (*Id.* at 533; *Moore v. Arizona,* 414 U.S. 25, 26 (1973).) Rather than rely on any legal fiction, the decision in *Barker v. Wingo* commands that the trial court consider whether and to what extent each of the relevant factors is actually present and then "engage in a difficult and sensitive balancing process" based on the facts of each case.

The opinion by the California Supreme Court ignores the clear ruling of *Barker v. Wingo* by establishing a fixed standard for determining the length of delay sufficient to trigger further inquiry. The court below compounded its error by selecting the statute of limitations period set by the state legislature, and thus subject to change and variations from state to state, to define the length of delay which is "presumptively prejudicial" under the Constitu-

tion.[11] (*Serna v. Superior Court, supra,* at 253, as modified at 40 Cal.3d 702a; App., *infra,* A-15, A-56.) By thus establishing an inflexible standard for determining when delay is "presumptively prejudicial," the opinion below directly conflicts with the clear ruling in *Barker* that such determinations must be made on a case by case basis.[12]

Equally wrong is the conclusion by the court below that if the delay exceeds one year it must be presumed that some actual prejudice to the defendant resulted. The court below agreed with respondent's contention that if the delay is found to be "presumptively prejudicial," "the trial court must assume some inherent prejudice . . . ." (*Id.* at 252; App., *infra,* A-14.) The opinion below actually deletes from the balancing process the fourth factor identified by this Court in *Barker v. Wingo;* actual prejudice to the defendant. It states in language which completely confuses the clear balancing process described in *Barker v. Wingo:*

> Therefore, although there may be cases in which a defendant is able to demonstrate actual prejudice from delays of shorter duration, *he need not do so when the delay exceeds one year.* Delays of that

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[11]Such use of the statute of limitations period was rejected in *Gray v. King,* 724 F.2d 1199, 1202 n. 4 (5th Cir. 1984).

[12]The California court used the one-year statute of limitations applicable to most misdemeanors despite the fact that the crime charged in the instant case, embezzlement, and all other "wobblers" carry a three-year limitations period. (California Penal Code section 801.) Since the stated reason for using the statute of limitations as a touchstone is that "Statutes of limitation reflect a legislative construction of the speedy trial guarantee," the fact that the Legislature had determined that the statute of limitations for the crime in the instant case is three years would compel the conclusion that only a three-year delay should be considered "presumptively prejudicial." (*Serna v. Superior Court, supra,* at 254, 702a; App., *infra,* A-16, A-17, A-56.)

> magnitude are presumptively prejudicial. (*Id.* at 254 as modified at 702b; App., *infra,* A-17, A-56, emphasis added.)

The above-quoted language thus wrongly states that if the delay exceeds one year, the fourth factor of prejudice should not be considered but should be presumed to exist.

The opinion below conflicts with the decisions from the vast majority of the circuits of the United States Court of Appeals which hold that even where a delay is "presumptively prejudicial" no actual prejudice to the defendant is presumed. In *Look v. Amaral,* 725 F.2d 4 (1st Cir. 1984), for example, the prosecution conceded that a delay of nearly four years "went well beyond any threshold of 'presumptive prejudice' needed to trigger the balancing." (*Id.* at 6.) Nevertheless, when the analysis turned to the fourth factor of the *Barker v. Wingo* balancing test, the court held that "the particular circumstances of each case must be examined to see if any actual prejudice resulted." (*Id.* at 7.) Upon such an examination, the court found that "little prejudice" had resulted and that any such prejudice was "trivial" and denied the motion to dismiss. (*Id.* at 7-8.) Other cases in which the threshold requirement of "presumptively prejudicial" delay was satisfied but the court found that no actual prejudice resulted include *United States v. Crow Dog,* 532 F.2d 1182, 1192-1194 (8th Cir. 1976); *United States v. Jenkins,* 701 F.2d 850, 856-857 (10th Cir. 1983); *United States v. Frazier,* 584 F.2d 790, 792 (6th Cir. 1978); *United States v. Greene,* 578 F.2d 648, 655-656 (5th Cir. 1978); and *United States v. U.S. Treasury Bills,* 750 F.2d 900, 902 (11th Cir. 1985).

At least two circuits, however, have reached a contrary conclusion and held that actual prejudice can sometimes be presumed. In *United States v. Jackson,* 542 F.2d 403, 406 (7th Cir. 1976), the court stated "It is manifest that prejudice, always a difficult thing to ascertain, must, at

some point, be presumed . . . ." Nevertheless, the court in *Jackson* went on to consider whether the defendant suffered actual prejudice and made the apparently contradictory observation that

> The relevant inquiry for this court is "not so much with the inherent possibility of prejudice in a general sense as with whether there was specific prejudice to [defendant] in his defense." (*Id.* at 408, quoting *United States ex rel. Little v. Twomey,* 477 F.2d 767, 771 (7th Cir. 1973).)

This demonstrates the confusion sometimes engendered by the facial similarity of the term "presumptively prejudicial" used to describe the threshold requirement of the first factor of the *Barker v. Wingo* balancing test and the term "prejudice" which constitutes the fourth factor of the test.

The Ninth Circuit has also flirted with this confusion. In *United States v. Loud Hawk,* 741 F.2d 1184 (9th Cir. 1984) overruled in ____ U.S. ____ (January 21, 1986), the court adopted the above-quoted language from the Seventh Circuit concerning presumed prejudice. (*Id.* at 1193.) Only a few months earlier, however, the Ninth Circuit had apparently rejected such a presumption of actual prejudice. (*United States v. Guerrero,* 756 F.2d 1342, 1350 (9th Cir. 1984).)

The use of presumptions of any kind is inconsistent with the approach adopted in *Barker v. Wingo* which requires that the peculiar facts of each case be carefully considered to determine whether a speedy trial was denied. This Court should clarify this issue and thus resolve the conflict between the opinion below and the decisions of the majority of the circuits of the United States Court of Appeals as well as the conflict among the circuit courts themselves.

CONCLUSION

The opinion below establishes a disturbing precedent and constitutes a substantial departure from the approach used by this Court to determine Sixth Amendment speedy trial issues. Yet the seeds of some of the California Supreme Court's erroneous holdings were sown by somewhat ambiguous language contained in this Court's decisions in *United States v. Marion* and *Barker v. Wingo*. These ambiguities have generated similar confusion in lower federal courts and other state courts.

Accordingly, this Court should accept the instant case in order to resolve four important questions: 1. Does the Sixth Amendment right to a speedy trial apply when the defendant has not been arrested, is unaware of the charges, and is not available for prosecution? 2. Does the filing of a complaint and the issuance of an arrest warrant invoke the protection of the Speedy Trial Clause in misdemeanor cases? 3. Can the statute of limitations period be used to define the length of delay sufficient to meet the threshold requirement described in *Barker v. Wingo*? and 4. In conducting the balancing test described in *Barker v. Wingo*, should it be presumed that the defendant actually suffered prejudice?

DATED: February 13, 1986

Respectfully submitted,

JAMES K. HAHN,
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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 13, 1986, I served the within Petition for Writ of Certiorari in re: "People of the State of California v. Joaquin Mario Serna" in the United States Supreme Court, October Term 1985, No. ..... and Appendix thereto;

on the Attorney in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 13, 1986, at Los Angeles, California

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